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REDACTED – FOR PUBLIC INSPECTION

May 9, 2019

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 18-141 - *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*

WC Docket No. 16-143 – *Business Data Services in an Internet Protocol Environment*

Dear Secretary Dortch:

On behalf of U.S. TelePacific Corp., Mpower Communications Corp. and Arrival Communications, Inc. (all dba “TPx”), and in accordance with the procedures outlined in the Protective Order,¹ enclosed for filing is the redacted version of TPx’s comments for filing in this proceeding.

¹ *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, DA 19-294, ¶¶ 5, 13, Protective Order (rel. April 16, 2019); *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Order and Data Collection Protective Order, 29 FCC Rcd 11657 (WCB 2014); *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, et al., Order and Modified Data Collection Protective Order, 30 FCC Rcd 10027 (WCB 2015); *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143, et al., Order, 31 FCC Rcd 7104 (WCB 2016).

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The CONFIDENTIAL version of the comments have been filed by hand delivery and copies sent to Michele Levy Berlove of the Wireline Competition Bureau, Competition Policy Division as well as Christopher Koves and Marvin Sacks of the Pricing Policy Division.

Any questions relating to this filing should be directed to the undersigned.

Respectfully Submitted,

/s/ Tamar E. Finn

Tamar E. Finn
Patricia Cave

Counsel for U.S. TelePacific Corp., Mpower Communications Corp. and Arrival Communications, Inc. (all dba "TPx")

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition of US Telecom for Forbearance Pursuant)	WC Docket No. 18-141
To 47 U.S.C. §160(c) to Accelerate Investment)	
In Broadband and Next-Generation)	
Networks)	
)	
Business Data Services in an Internet Protocol)	WC Docket No. 16-143
Environment)	
)	

**COMMENTS OF U.S. TELEPACIFIC CORP., MPOWER COMMUNICATIONS CORP.,
AND ARRIVAL COMMUNICATIONS, INC. AND CORRECTED 2015 II.A.4 DATA**

U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all doing business as TPx Communications (“TPx”), ask the Commission to (1) permit TPx to correct its 2015 II.A.4 Data and (2) ensure that any analyses of the *2015 Data Collection* do not rely on competitive providers’ locations served by Unbundled Network Elements (“UNEs”) to justify forbearance or reduced regulation of incumbent local exchange carrier (“ILEC”) Business Data Services (“BDS”) transport offerings.

The Wireline Competition Bureau (the “Bureau”) seeks comment on “the extent to which the April Data Tables inform the extent of competition and competitive pressure in the market for lower speed (DS3 and below) time division multiplexing (TDM) transport services in price cap

areas.”¹ The Bureau also seeks comment on the extent to which the *2015 Data Collection* provide[s] relevant information to evaluate USTelecom’s request for forbearance from the requirements to provide transport as an unbundled network element[.]” Finally, the Bureau seeks comment on “the public filings submitted in response to the *Second Further Notice and Further Notice* in the BDS proceedings, WC Docket Nos. 17-144, 16-143 and 05-25, since it was released on October 24, 2018.”²

I. Any Analysis that Relies on II.A.4 Data from the 2015 Data Collection Should Use Corrected TPx Data.

On April 15, 2019, counsel for TPx filed an objection to reliance on the data from Table II.A.4 in U.S. TelePacific Corp.’s Highly Confidential BDS Collection responses regarding locations served by TPx (the “2015 II.A.4 Data”) unless the Commission provides TPx sufficient opportunity to review and correct such data.³ TPx explained that it believed the Commission’s assumptions in the BDS proceeding relied in part on erroneous 2015 II.A.4 Data that resulted either from an inadvertent over-reporting of some end user connections as on-net or analysis by the Commission that incorrectly counted TPx UNE-based connections as on-net.

In the 2015 II.A.4 Data, TPx reported serving a total of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] locations, approximately 90 percent of which are located in California. Of the reported locations, TPx reported serving [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

¹ *Wireline Competition Bureau Seeks Focused Additional Comment in Business Data Services and USTelecom Forbearance Petition Proceedings and Reopens Secure Data Enclave*, Public Notice, WC Docket Nos. 18-141, 17-144, 16-143, 05-25; RM-10593, DA 19-281 (rel. April 15, 2019) (“*Public Notice*”).

² *Id.* at 2.

³ See Letter from Tamar Finn, Counsel to U.S. TelePacific Corp., to Marlene H. Dortch, Secretary, FCC (filed April 15, 2019).

[END CONFIDENTIAL] using UNEs (including DS1/DS3 and DS0 UNEs), and did not specify the last-mile connections enabling service to the remaining [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] locations.

The Commission’s Further Notice of Proposed Rulemaking relied on the *2015 Data Collection*, including the 2015 II.A.4 Data, to classify TPx as one of the top four, non-cable “largest facilities-based providers ... excluding reported locations with UNE connections”.⁴ Given TPx’s geographically limited network footprint and low number of on-net customers (*i.e.*, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] locations before correcting the data), it is unclear how the Commission ranked TPx in the top four. Shortly after the Further Notice was released, TPx reviewed its 2015 II.A.4 Data again and determined it had inadvertently included as on-net [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] end user locations that TPx served using another carrier’s last mile facility.

TPx agrees with INCOMPAS that “‘distances between the fiber and ILEC end offices’ is the relevant measure of competition” for interoffice transport.⁵ To the extent the Commission or any party evaluates the distance from end user locations, it should rely on end user locations served by competitive fiber only, not by UNEs. Due to the passage of time, it would be unduly burdensome for TPx to determine whether the locations included in error in the 2015 II.A.4 Data, at the

⁴ *In the Matter of Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, para. 58 (2016).

⁵ *Public Notice*, n.3 (citing Comments of INCOMPAS, WC Docket Nos. 16-143, 05-25, at 8 (filed Feb. 8, 2019)).

time of the *2015 Data Collection*, were served via UNEs obtained from ILECs or through other arrangements such as a commercial agreement for last mile (*e.g.*, commercial Ethernet). TPx therefore provides **Highly Confidential Attachment A** listing locations originally included in TPx 2015 II.A.4 Data that should NOT have been included as on-net locations for TPx. To the extent any analysis in the USTelecom Forbearance or BDS Transport proceeding about the level of facilities-based competition relies on competitive fiber providers' on-net end user locations, the Commission/party should remove the TPx locations in Confidential Attachment A from its analysis.

In light of the demonstrated importance of UNEs to preserving and promoting competition in local markets, the Commission also should ensure that its analysis of competitive fiber does not rely on locations served by any competitive provider via UNEs. Relying on locations served by UNEs to forbear from the statutory obligation for ILECs to make UNEs available to competitors would be arbitrary and capricious.

II. Reliance on Flawed Form 477 Data to Make Determinations About the Status of Facilities-Based Competition Would Not Be Reasoned Decision Making.

Chairman Pai has said that the “Form 477 generates one of our most important data sets at the Commission, one we rely on every day.”⁶ Recognizing this, the Commission under Chairman Pai’s leadership “began a top-to-bottom review of the Form 477 process in order to ensure that broadband data was more accurate, granular, and ultimately useful to the Commission and the public.”⁷ The Commission recognizes that the Form 477 data collection process is flawed and overstates the extent of deployment across the country. The President and CEO of USTelecom

⁶ *In the Matter of Modernizing the FCC Form 477 Data Program, Further Notice of Proposed Rulemaking*, WC Docket No. 11-10, 32 FCC Rcd 6329, 6370 (2017) (Statement of Chairman Ajit Pai) (“*Form 477 FNPRM*”).

⁷ See also Letter from Ajit V. Pai, Chairman, FCC to Hon. Joe Manchin, Senator (April 26, 2019).

agreed, testifying before the Senate Commerce Committee that Form 477 data tends to overstate broadband availability.⁸

TPx agrees that “[a]ccurate and reliable data on fixed and mobile broadband and voice services are critical to the Commission’s ability to meet its goal of decision-making based on sound and rigorous data analysis.”⁹ Despite widespread agreement among industry and policymakers that Form 477 deployment data is flawed, USTelecom urges the Commission to rely on it in this proceeding, arguing that “while it is essential to have more granular last-mile broadband availability data in the context of, for example, targeting scarce federal universal service dollars to unserved locations, the Form 477 are perfectly adequate to assess the environment for the deployment of competitive facilities.”¹⁰ The fundamental question that the Commission must answer in both contexts (*i.e.*, universal service and forbearance) is the same: What is the status of facilities-based competition? In targeting limited universal service resources, the Commission uses the Form 477 data to decide which census blocks are unserved and which could be served by unsubsidized competitors (*i.e.*, one that is “a *facilities-based* provider of residential fixed voice and broadband service that does not receive high-cost support”).¹¹ Here, the Commission is tasked with determining

⁸ See Testimony of Jonathan Spalter President and CEO, USTelecom before the Senate Commerce Committee “Broadband Mapping: Challenges and Solutions,” at 2 (April 10, 2019). USTelecom also opposed the Commission’s efforts to seek sub-census block reporting on the Form 477 and advocated for reducing the reporting schedule to annual filings (instead of the current semi-annual reporting). See Comments of USTelecom, WC Docket No. 11-10 (filed Oct. 10, 2017).

⁹ *Form 477 FNRPM*, 32 FCC Rcd at 6331, ¶ 6.

¹⁰ See Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom, to Marlene Dortch, Secretary FCC, WC Docket No. 18-141, n. 25 (filed May 6, 2019).

¹¹ See 47 CFR § 54.5 (emphasis added).

whether *facilities-based* competition by carriers that are not ILECs in the relevant geographic and product markets is sufficient to justify forbearance.

Even if the Commission relied on Form 477 broadband deployment data in prior proceedings, questions about the accuracy and reliability of that data show the Commission should not rely on it in this proceeding. Moreover, the fact that the Commission has used various mechanisms to test the accuracy of Form 477 data in prior universal service proceedings demonstrates that Form 477 data should not – without further scrutiny – serve as the basis for far-reaching policy determinations that rely on the availability of facilities-based competition. It would be arbitrary and capricious for the Commission to rely on insufficiently granular (and overbroad) Form 477 deployment data to make new determinations about the status of facilities-based competition in these proceedings, or to rely on the Commission’s analyses in prior proceedings that relied on Form 477 data that the Commission acknowledges is not accurate or granular.

III. The Commission Must Define the Appropriate Market to Measure Competition.

As TPx advocated in the USTelecom Forbearance proceeding, the Commission must assess competition in all relevant geographic and product markets before it grants forbearance.¹² TPx agrees with INCOMPAS that relying “on the existence of competitive fiber anywhere in a census block and within a certain distance from locations with BDS end-user demand” is not relevant to analysis of competition in interoffice transport.¹³ As INCOMPAS explains, because interoffice

¹² See generally Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, (filed Aug. 6, 2018); U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. Support for Motion for Summary Denial, WC Docket No. 18-141, (filed Sept. 5, 2018); Reply Comments of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, (filed Sept. 5, 2018).

¹³ Comments of INCOMPAS, p. 8, WC Docket No. 16-143 & 05-25 (filed Feb. 8, 2019).

transport carries traffic *between* ILEC offices – not to or from a customer location – the distance between competitive fiber and a BDS customer’s location and the percentage of census blocks with competitive fiber are irrelevant.¹⁴ Commission reliance on irrelevant data points or an overly inclusive competitive market test to support granting forbearance in the USTelecom Forbearance, or reduced regulation in the BDS Transport proceedings, would be arbitrary and capricious.

IV. Conclusion

To the extent any analysis in this proceeding relies on competitive fiber providers’ on-net end user locations, the Commission/party should remove the TPx locations in **Highly Confidential Attachment A** from such analysis. The Commission also should ensure that any analyses of the *2015 Data Collection* do not rely on competitive providers’ UNE-served locations. Nor should the Commission rely on flawed Form 477 data and/or overly inclusive competitive market tests for assessing facilities-based competition.

Respectfully submitted,

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May 9, 2019

¹⁴ *Id.*

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HIGHLY CONFIDENTIAL ATTACHMENT A

Correction to TPx 2015 II.A.4 Data